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In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Board (R. 38) are reported at 92 NLRB 1622. The opinion of the court below (R. 72) is reported at 196 F. 2d 424.

JURISDICTION

The judgment of the court below was entered on April 29, 1952 (R. 76). A petition for rehearing, filed by the respondent on May 16, 1952, was denied on June 18, 1952 (R. 82). The decree, de-

tailing the terms of the judgment, was entered on July 8, 1952 (R. 84). The petition for a writ of certiorari was granted on October 13, 1952 (R. 89). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Since its decision in *F. W. Woolworth Company*, 90 NLRB 289, the National Labor Relations Board has determined the back pay to which an employee discriminatorily denied employment is entitled by computing the net back pay to which the employee is entitled for each 3-month calendar period and totalling the quarterly net amounts. Under this method of computation, earnings in any quarter which exceed the amount the employee would have earned in the employment from which he was discriminatorily barred are not treated as diminishing the back pay accrued in any other quarter. The question presented is whether the Board may use this method of computing back pay or whether, as the court below held, the Board must use its former method of deducting from the amount the employee would have earned in the job he was discriminatorily denied, during the period of discrimination taken as a whole, the employee's total earnings in other employment for that period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C.,

Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 45-48.

STATEMENT

The Board found that eleven employees had been discriminatorily denied reemployment by the Company at the end of a strike (R. 39), and ordered their reinstatement with back pay (R. 41). The order directed that back pay "be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*," (90 NLRB 289) (June 12, 1950) (R. 41, 60), described in the Question Presented.

On the Board's petition for enforcement, the court below decreed that the entire order be enforced, with the exception of the method prescribed for computing back pay. Denying enforcement to that part of the order which prescribed the *Woolworth* formula, the court below ordered that "the method followed by the Board itself prior to the *Woolworth* case . . . should be followed here" (R. 76).

SUMMARY OF ARGUMENT

I

The method which the National Labor Relations Board had used prior to the *Woolworth* decision in 1950 to compute the back pay due to employees who had been unlawfully discharged was found by the Board to be unsatisfactory in those cases in which the employee obtained interim employment at a wage greater than the wage he would have earned in continuous employment at his original job.

In such cases, the greater wages earned during the interim employment reduced, and sometimes wiped out, the back pay accrued during earlier periods of total unemployment or employment at lower wage rates. When that formula operated in this way, it brought about three undesirable consequences: (1) when the employee obtained a better paying job he was compelled to waive his right to reinstatement in his original job in order to preserve his back pay which had already accrued; (2) if the employee nevertheless clung to his right of reinstatement, the employer would deliberately delay offering reinstatement as long as possible, even after the Board had ordered reinstatement, so as to take advantage of this opportunity to diminish his back pay liability; and (3) if the employee did not relinquish his right of reinstatement, his back pay claim was reduced so that he was not even approximately reimbursed for the wages he would have earned from the discharging employer during the time he lost from work as the result of the employer's illegal discrimination.

The Board concluded that these circumstances were substantially impeding effectuation of the policies of the Act, and undertook a thorough study of the situation with a view to devising a more satisfactory method of computing back pay. From a number of suggestions, the Board selected the *Woolworth* quarterly formula, noting that it would "constitute an appropriate, fair, and practicable method of computation." *F. W. Woolworth Co.*, 90 NLRB 289, 293. Since, under this method of

computation, greater wages in later periods of discrimination no longer reduce the back pay accrued for time lost from work in earlier quarters, the discriminatee is no longer compelled to waive his right to reinstatement in order to preserve his back-pay claim; he is now substantially reimbursed for time actually lost from work; and the employer no longer finds it economically advantageous to delay reinstatement as long as possible.

II

In remedying illegal discrimination, the Board is charged with the duty to require "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act (Section 10(c)). The "effectuation of [these policies] generally require[s] not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194. The Board properly concluded that the shortcomings of the pre-*Woolworth* formula were impeding effectuation of the policies of the Act, for the discriminatee's waiver of his right to reinstatement and the failure adequately to reimburse his losses prevented restoration of the situation which would have existed, and the employer's delay in offering reinstatement unduly postponed that restoration. The Board was acting within the

bounds of the discretion committed to it by Congress when it devised an alternative method for computing back pay, in order better to effectuate the policies of the Act. See *Nathanson, Trustee* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, pp. 4-5.

In so exercising its discretion to adjust the means to the end, the Board did not exceed any limitations upon its authority to effectuate the policies of the Act. Far from making the employee "more than whole," the *Woolworth* formula does not even adequately reimburse the discriminatee for the time he loses from work as remunerative as that from which he was illegally discharged, for it at most compensates him for no more than that time, without interest or other credit for delay in payment. Of course, this formula does not even attempt to compensate for other losses incurred as the result of the employer's discrimination. In any event, the Board is not fettered by common law principles governing the duty to "make whole" an employee suing for breach of an employment contract (*Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543), for the "Board * * * does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared policy of the Act to eliminate and prevent obstructions to interstate commerce' by encouraging collective bargaining.'", *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193. On the contrary, the Board is enjoined by Congress to compute back pay

in the manner which best effectuates the policies of the Act; the Board would have been derelict in its duty had it not endeavored to devise a formula more satisfactory than the method used prior to the *Woolworth* formula.

Nor can it be said that a back-pay order based upon the *Woolworth* formula is "penal" rather than "remedial," and therefore beyond the Board's authority. Under no circumstances can this formula operate to alter the back-pay liability of an employer who promptly complies with the Act; in such a case, the *Woolworth* formula is no different from the method previously in use. Nor can this formula, under any circumstances, operate to impose upon an employer who delays reinstatement, perpetuating his illegal discrimination, any greater liability than that imposed upon the employer who promptly complies with the Act; rather, this formula merely removes a discrimination which previously existed in favor of the employer who delays reinstatement.

Finally, in suggesting that the Board could better remedy the deficiencies of the pre-*Woolworth* formula by some process of *ad hoc* adjudication, the court below failed to "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194. Moreover, no process of *ad hoc* adjudication of the sort apparently contemplated by the court below could con-

ceivably achieve the salutary results achieved by the *Woolworth* formula. Such adjudication would not even be addressed to the problem of adequately compensating the discriminatee for loss of equally remunerative working time, or for loss of Social Security credits. Since such adjudication would take place at the unfair labor practice hearing, when the Board decides whether to issue an order of reinstatement, this process could not, as does the *Woolworth* formula, free the discriminatee from the need to waive his right to reinstatement after that hearing, or eliminate the reward which accrues to the employer who delays compliance with the Board's order. Nor could an endless stream of subsequent hearings—hardly feasible in any event—prospectively achieve these results, unless they culminated in an order based upon the *Woolworth* formula.

ARGUMENT

Congress has delegated to the National Labor Relations Board the power to require "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the National Labor Relations] Act," where employees have been discriminatorily denied employment. Section 10 (c). The sole question presented in this case is whether, despite this delegation of power, Congress has withheld from the Board the authority to devise a quarterly formula for computing the back pay due from an employer who has illegally discriminated against and discharged an employee. In Part I of the

succeeding argument, we shall explain the deficiencies of the method of computation previously in use; the manner in which the *Woolworth* quarterly formula remedies those deficiencies, and the reasons why the Board selected the *Woolworth* formula in preference to other possible remedies. In Part II we shall demonstrate that Congress has conferred upon the Board—and exclusively upon the Board—the authority to devise just such a formula in order to protect the exercise by workers of their rights of full freedom of association, of self-organization, and of collective bargaining.

I

The *Woolworth* Formula Was Devised in Order (1) to Protect the Dischargee's Right to Reinstatement in the Job from Which He Was Illegally Discharged; (2) to Minimize the Benefits Which Accrue Exclusively to the Employer Who Delays Offering Reinstatement, and (3) to Compensate the Dischargee as Nearly as Possible for Time Lost from Work

A. THE PRE-*WOOLWORTH* FORMULA WAS UNSATISFACTORY IN THREE PRINCIPAL RESPECTS

Until 1950, the Board had generally computed the net back pay due to an employee who had been discriminatorily discharged in the following manner: (1) by computing the gross back pay which the employer would have paid the dischargee but for the discrimination, from the time of the discrimination to either the employer's offer of reinstatement or the employee's waiver of reinstatement, whichever came first, and (2) by subtracting from this amount the net interim earnings of the dis-

chargee during that same period.[1] Under this formula, it is apparent that when, after a period of unemployment, the discriminatee secured employment at a higher wage, and so long as he remained in that employment, he materially reduced the amount of back pay which would have accrued to him to compensate him for the time when he was unemployed. This reduction resulted from deducting the greater earnings in the later interim periods from the back pay accrued in the earlier periods of unemployment or employment at a lesser wage. In many cases, indeed, the later earnings wiped out this accrued back pay altogether.

From 1934 to 1940 this circumstance attracted little attention, for interim employment at a higher wage than would have been earned in continuous employment was not common. Beginning about 1940, however, the increasing demand for labor made such interim employment more frequently available, and the Board became increasingly concerned with this problem. After observing for several years, during which the labor market was tightening and wages generally were rising, the effects on compliance with Board orders of the prevalence of better paying interim jobs, the Board concluded that when back pay was computed according to a formula which permits greater earnings

[1] This formula was adopted in the Board's first decision, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, modified and enforced, 91 F. 2d 178 (C.A. 3), modification reversed, 303 U.S. 261, although the concept of "net interim earnings" was not introduced until 1938, in *Crossett Lumber Co.*, 8 NLRB 440, 500. See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198, n. 7.

in later interim periods to diminish or wipe out the back pay accrued in earlier periods of unemployment or employment at a lesser wage, the back-pay order fails in three chief respects to accomplish its objective of restoring as effectively and as early as possible the situation "which would have obtained but for the illegal discrimination" *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194.

1. When a better paying job than the one from which he had been discriminatorily discharged presented itself, the dischargee was confronted with a dilemma. Regardless of his preference, he was compelled by immediate economic necessity to take the new job. Further, he knew that if he wilfully refused the new job, the back pay which might ultimately be awarded him would be reduced by the amount which he could have earned at the new job. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 199-200. If he took this new job, however, under the pre-*Woolworth* formula his greater earnings reduced and ultimately wiped out the back pay due him for the working time already lost. If he wished to prevent this loss, the only course was to give up his right to reinstatement in the job from which he was illegally discharged. In that event, the back pay would be computed only for the intervening unemployment period, without regard to any later wages.

2. When the employer who had discriminatorily discharged an employee knew or suspected that

the dischargee had found or would soon find a better paying job, he found it financially advantageous to perpetuate his discrimination and delay reinstatement as long as possible, for, under the pre-*Woolworth* formula, each day reduced the employer's back pay liability. This situation most commonly arose after the employer was aware that he had committed an unfair labor practice, or that the Board was conducting an investigation. At that time, it profited the employer to look about to see the status of the employees who had been discharged and to delay reinstatement accordingly. Even after the Board had ordered reinstatement, and the order had been enforced by the courts, the employer found it profitable to prolong negotiations and delay a settlement as long as possible.[2]

3. While in theory the dischargee under the pre-*Woolworth* formula ultimately received a sum equal to that which he would have received had no

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[2] A report prepared by the Board's staff in 1946 notes the following example: In one case, the Board's order, as enforced in 1945, required reinstatement of 171 employees with back pay beginning in 1937. The Company has as yet made only incomplete offers of reinstatement and has taken no steps to comply with the back pay provisions of the order; only recently did it agree to permit the Board's agents to microfilm its records preparatory to beginning back pay computations. The following statement by the Board analyst assigned to the case is significant:

> ". . . the Union and the Company are in agreement on one point: namely, there is little net back pay in this case if back pay is computed on a total period basis. The Company attorney stated that 'several years ago he offered to settle the case for $25,000 but that he felt now . . . the company owed only a few thousand dollars' and 'that he thought little if any net back pay was due because of high earnings of the claimants during the war years'."

discrimination occurred, the losses which he suffered during the period when he was unemployed and without income were not fully compensated. It is by no means unusual for an employee who is without work for a considerable period to be forced to exhaust his savings, if any; to forego installment payments on such items as insurance, chattels, and home, possibly losing all of them; and to fail to provide his family with proper medical care and other necessities. These losses are not fully compensated where the employee, months or years later, earns more money than he would have earned if he had continued throughout to work for the employer who initially discharged him. Yet, under the pre-*Woolworth* formula, greater earnings in subsequent periods often resulted in total elimination of back pay, thereby eliminating all compensation for time actually lost from work.[3]

Further, under the pre-*Woolworth* formula the discriminatee in some cases received no compensation whatever for the loss of credits to his Social Security account. Eligibility for insurance status depends not upon the amount of earnings credited to the employee (except for a minimum quarterly amount), but upon the number of quarters of cov-

[3] An analysis of this problem, prepared for the Board by its staff in 1946, listed the following as examples of claimants who were unemployed for part of the back-pay period but received little or no back pay:

Case	Claimant	Length of Back-Pay Period	Length of Back-Pay Unemployment	Gross Back Pay	Net Back Pay
Wilson & Co., C-1551	Remski, S.	21 mos.	8 mos.	$2,485.49	$ 87.61
	Culotta, A.	18 mos.	8 mos.	1,668.36	150.64
Remington-Rand, C-145	Greenleaf	45 mos.	14 mos.	8,472.79	853.26
	Peiffer	42 mos.	7 mos.	8,004.15	0

ered employment.[4] Quarters for which back pay is in fact awarded are included within this definition, and the Social Security Board must allocate the back pay over the appropriate quarters to provide appropriate coverage. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 370. However, when the gross back pay attributable to a period of unemployment is entirely wiped out by greater earnings in other quarters than the employee would have enjoyed in those quarters in his original employment, there is no back pay to allocate to quarters in which the discriminatee is entirely unemployed, and he loses all Social Security credit for those quarters.

B. TO REMEDY THESE DEFICIENCIES THE BOARD FOUND IT NECESSARY TO DEVISE THE *WOOLWORTH* FORMULA

To remedy the observed deficiencies in the operation of the formula the Board considered a number of alternative approaches including the following:

1. To award the dischargee his gross back pay, ignoring interim earnings entirely in all cases. This proposal would impose upon the employer a greater liability and confer upon the discriminatee a greater benefit than was thought necessary to remedy the employer's unfair labor practice. Accordingly, it would probably not be acceptable under *Phelps Dodge, supra.*

2. To compute back pay only for those periods in which the dischargee is unemployed or employed at a lesser wage than he would have earned in his

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[4] 64 Stat. 477, 505, 42 U.S.C., Supp. V, 414. See also, 20 C.F.R. (1949 ed.) 403.201-202.

previous job, ignoring those periods when he is working at a greater wage. This proposal strikes directly at the cause of the shortcomings of the pre-*Woolworth* formula, measuring back pay by time actually lost from equally remunerative work, and is therefore theoretically desirable. However, it would be extremely complicated to apply because of the lack of detailed information concerning the precise periods and amounts actually earned by the dischargee (see p. 17, *infra*).

3. To compute back pay only from the time of the discrimination to the time of the employer's offer of reinstatement or to the date when the dischargee obtains a better paying job, whichever is first. This is the formula selected by the New York State Labor Relations Board. See Seventh Annual Report of the New York State Labor Relations Board, 1943, p. 20; Fourteenth Annual Report of the same agency, 1950, p. 75.[5] This formula differs from the preceding one only in that it is administratively somewhat less complicated and in that it deprives the discriminatee who has obtained a short-term better paying job of any back pay for subsequent periods during which the employer still refuses to offer reinstatement. This formula pre-

[5] These reports do not indicate any further refinements in the operation of this formula. However, a letter to the General Counsel of the National Labor Relations Board from A. M. Goldberg, Acting Executive Secretary of the New York State Labor Relations Board, dated August 11, 1952, indicates that if the problem arises, some effort may be made to compensate the dischargee for periods of unemployment occurring after his better paying job terminates, but before the employer offers reinstatement. If this is done, the New York formula would be more closely analogous to the second formula suggested above.

sented a feasible, but unsatisfactory, compromise.

4. To divide the back-pay computation into two periods: (1) from the date of discrimination to the date of the Board's order of reinstatement, and (2) from that date to the employer's offer of reinstatement. Under this formula, greater earnings in the second period would not offset back pay accrued in the first period; consequently, the employer would seldom be encouraged to delay compliance with the Board's order. However, this formula would remedy the other shortcomings of the pre-*Woolworth* formula only insubstantially, if at all.

5. To divide the back-pay computation into fixed periods in either of two ways.

A. To divide the back-pay computation into payroll periods, crediting greater interim earnings in any given payroll period only against wages the dischargee would have earned in that period. This formula very nearly approaches the abstract justice of the second formula suggested above, in that it very nearly compensates the discriminatee for time actually lost from work, and at first glance it seems eminently desirable. Careful study, however, demonstrated that it was impracticable. First, the basic difficulty in the use of the payroll period is that of allocating the employee's interim earnings to the payroll periods of the employer who discriminatorily discharged him, for usually the two employers will not use exactly the same payroll periods. Even the simplest sort of case would require an immense amount of paper work to adjust the two periods. And this allocation would become

a staggering task—an invitation to endless controversy—when to the simple case are added the complications of shift schedules, overtime payments, production bonuses, deferred incentive payments, piece rates, and the like. Second, as a practical matter, the information necessary to compute the interim earnings on a payroll period basis is not available. The Social Security Board (the chief source of the Board's information in computing back pay) has data only for quarterly periods. The dischargees themselves have shown their memories to be highly unreliable, as is only to be expected when it is realized that the information required may date back many years, and may involve many forms of employment with many different interim employers. The interim employers are generally rather unwilling to compile the necessary data themselves. Although this information could theoretically be obtained through the issuance of prehearing subpoenas (a practice which the Board does not normally employ), it is hardly feasible to send investigators equipped with such subpenas to the offices of all the interim employers all over the country who may have become involved in any particular case.[6]

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[6] The court below observed: "The employees here involved were not compensated on a quarterly basis" (R. 76). Apparently implicit in this observation is the assumption that a formula based upon payroll periods would be valid. If the gist of the decision below is that a quarterly formula is unreasonable or capricious by comparison with a formula based upon payroll periods, we respectfully submit that the court below not only overlooked the significance of the considerations noted above, but also failed to "guard against the danger of sliding unconsciously from the narrow confines of law into

B. To divide the back-pay computation into quarterly periods, crediting greater interim earnings in any given quarter only against wages the dischargee would have earned in that quarter. This formula, unlike the first one suggested above, does not alter the employer's back-pay liability in those cases where the dischargee finds no interim employment, or finds interim employment at a wage no greater than he would have earned but for the discrimination. As shown by the illustrations in the table on the opposite page this formula reaches a different result from the pre-*Woolworth* formula only in a case where the dischargee eventually finds employment at a wage greater than he would have earned. Being directed only at that sort of case, this formula substantially remedies the shortcomings of the pre-*Woolworth* formula without altering the back-pay computation in those cases where the old formula was satisfactory. This formula offers the employer much of the advantage previously derived from the dischargee's greater earnings, but does not offer a premium for delay in

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the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. See also *Nathanson, Trustee*, v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, pp. 4-5.

Assume that an employee is discriminatorily discharged on December 31 from a job at which he earns an average of $100 per month, and is offered reinstatement on the following July 1. The table below illustrates the operation of the *Woolworth* formula.

Period of Unemployment	Gross Back Pay	Interim Earnings	Net Back Pay	
			Pre-*Woolworth*	*Woolworth*
CASE I				
The dischargee finds no interim employment.				
First Quarter	$300	0	....	$300
Second Quarter	$300	0	....	$300
Total	$600	0	$600	$600
CASE II				
The dischargee finds interim employment at no greater wage than he would have earned but for the discrimination.				
First Quarter	$300	0	....	$300
Second Quarter	$300	$300	....	0
Total	$600	$300	$300	$300
CASE III				
The dischargee finds interim employment at a greater wage than he would have earned but for the discrimination.				
First Quarter	$300	0	....	$300
Second Quarter	$300	$400	....	0
Total	$600	$400	$200	$300

reinstatement; if the employer perpetuates his discrimination after the discriminatee finds a better job, he will be liable for just as much—but no less, and of course no more—back pay for past quarters as will the employer who more promptly terminates his discrimination and offers reinstatement. Since greater earnings will not offset back pay accrued in previous quarters, the dischargee is no longer compelled to waive his right to reinstatement in the job from which he was illegally discharged. Finally, this formula substantially restores to the dischargee the real wages which he has lost as a result of the employer's discrimination, and he receives full credit for quarters covered by Social Security. All this is achieved in a simple, workable manner, for the data on which back-pay computations are based is obtained from the Social Security Board in terms of quarterly periods.

The Board studied thoroughly the various reports and recommendations submitted by its staff, and finally in 1950 selected this latter, quarterly formula for general use, noting that it would "constitute an appropriate, fair, and practicable method of computation." *F. W. Woolworth Co.*, 90 NLRB 289, 293.

II

The Board Has the Power to Compute Back Pay on the Basis of Quarterly Periods, in Order to Restore, as Effectively and Early as Possible, the Employment Relationship Which Would Have Obtained But for the Employer's Discrimination

A. THE *WOOLWORTH* FORMULA IS CAREFULLY DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT

Congress has imposed upon the Board the authority, and the duty, when it finds that an employer has discriminatorily discharged an employee, to order the employer "to take such affirmative action including reinstatement with or without back pay, as will effectuate the policies" of the Act (Section 10(c)). "The declared policy of the Act in Section 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. See *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 539. "According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

In selecting the appropriate remedy for a given unfair labor practice, the Board is not bound to choose that which may subsequently appear most desirable to the courts. "Because the relation of remedy to policy is peculiarly a matter for administrative competence," *Phelps Dodge Corp.* v. *National Labor Relations Board, supra,* at 194, the wisdom of the Board's selection may not be put in issue before the courts. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 363; *Nathanson, Trustee* v. *National Labor Relations Board,* No. 33, this Term, decided Nov. 10, 1952, slip opinion, p. 5. The foregoing pages demonstrate that the Board, in devising the *Woolworth* formula, has over a period of many years studied thoroughly what it regarded as the defects of the pre-*Woolworth* formula, has considered extensively all the possible remedies for those defects, and has exercised its best judgment in selecting the formula best designed to achieve a fair and workable compromise among all the competing interests. This "administrative determination . . . should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board, supra,* at 540.

There is no such showing here. On the contrary, the foregoing explanation demonstrates that this order, like the order of reinstatement upheld in *Phelps Dodge Corp.* v. *National Labor Relations Board, supra,* at 194, is designed solely for the pur-

pose of restoring, as effectively and as early as possible, the normal employment relationship which would have obtained but for the illegal discrimination.

The Board's basic reason for changing the method of computing back pay was that the prior method of computation was undermining and frustrating the equally important remedy of reinstatement. Under the pre-*Woolworth* formula whenever an employee began to earn more than he would have earned in the position from which he had been discriminatorily discharged he was faced with the dilemma of either watching his already accumulated back-pay claim steadily decrease or waiving his right to reinstatement. As the Board observed, *F. W. Woolworth Co.*, 90 NLRB 289, 292, the severe economic detriment sustained by an employee during unemployment (particularly when prices are rising), which cannot be truly compensated by increased earnings over a future and protracted period, all too often induced employees to follow the latter course. The former method of computing back pay was thus tending to transform the concomitant remedies of "reinstatement with * * * back pay" into alternative and mutually exclusive remedies.

This Court has recognized, in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193-194, that reinstatement *with* back pay is indispensable to undo the effects of discrimination:

> * * * to limit the significance of discrimination merely to questions of monetary loss to

> workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. * * *
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> * * * According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires *not only compensation for the loss of wages but also offers of employment to the victims of discrimination.* Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. [Italics added.]

The discriminatee's right to reinstatement was considered so important in that case that a decree of reinstatement was upheld even though the dischargee had already obtained substantially equivalent employment elsewhere, for it is essential to return the dischargees "to the jobs of their choice." *Phelps Dodge Corp.* v. *National Labor Relations Board, supra,* at 200. The opportunity to make this choice between the original employment and new employment must be free from coercion, for a coerced waiver is no choice at all. Therefore, when its experience showed that the former method of computing back pay was actually compelling discriminatees to waive their right to reinstatement it was plainly proper for the Board to adjust the means of computation to remove, in part, this coercive aspect of the pre-*Woolworth* formula. In thus

correlating its back-pay order with the companion remedy of reinstatement the Board was simply seeking to restore more effectively the situation which would have obtained but for the discrimination. See *F. W. Woolworth Co.*, 90 NLRB 289, 292.

A second objective of the Board in devising the *Woolworth* formula was to avoid rewarding the employer who perpetuates his discrimination for a substantial time. As we have seen (pp. 11-12, *supra*), when the dischargee secured interim employment at a higher wage, the pre-*Woolworth* formula operated to reduce the employer's back-pay liability so long as he refused to offer reinstatement. The Board's experience showed that employers commonly delayed reinstatement as long as possible in order to take advantage of this windfall. Thus that formula, by its very nature, operated to postpone indefinitely achievement of the Board's primary objective—the restoration, as nearly as possible, of the situation which would have existed but for the discrimination. Convinced that its efforts to effectuate the policies of the Act were being in large measure undermined, the Board devised the *Woolworth* quarterly formula to eliminate this windfall. See *F. W. Woolworth Co.*, 90 NLRB 289, 292. Since greater interim earnings no longer cancel out back pay accrued for time lost in earlier quarters, the employer no longer derives a substantial advantage from perpetuating his discrimination, and the back-pay order no longer operates to postpone a restoration of the employment relationship.

A third objective of the Board in devising the *Woolworth* formula was to reimburse the dischargee as effectively as possible for the losses which he has incurred as a result of the employer's discrimination. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197. Only one of these losses—the loss of working time—can be measured even approximately in terms of money; to redress this loss the Board has from the beginning "directed the payment of wages for the time lost" from work. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48.

To be sure, the subsequent reimbursement of wages which would have been paid during the time lost from work does not entirely redress this loss, for "the failure to pay . . . . on time may be so detrimental to the maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707. Reluctant to enter this area of speculation, however, the Board has ignored the element of delay in awarding back pay,[7] confining

[7] The Board does not generally order interest on back-pay awards.

itself to an effort to restore to the discriminatee the back pay which he would have earned during the time which he lost from work.

As we have shown, under the pre-*Woolworth* formula the Board's back-pay orders fell short of this goal in a case where the dischargee, after a period of unemployment, secured employment at a higher wage than the wage he was earning at the job from which he was discriminatorily discharged. This shortcoming is simply illustrated by the example given in Case III, p. 19, *supra*: although the dischargee loses 3 entire months of work, during which he would have earned $300 from the employer who was guilty of the unfair labor practice, the pre-*Woolworth* formula awarded him only $200. Even this amount would be continually diminished as long as the discrimination endures. Thus, the "policy of promoting production and employment" (*Phelps Dodge Corp.* v. *National Labor Relations Board, supra*, at 200) "weaken[ed] the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment [at greater wages], declaring them barred from" recovering the back pay to which they were entitled for time lost from equally remunerative work. In the *Phelps Dodge* case, this Court refused to permit such a paradoxical interpretation of the Act to bar the dischargees from returning to the jobs of their choice. In line with that decision, the Board devised the *Woolworth* formula to pre-

vent the same paradox from barring the dischargees from receiving back pay for time already lost from equally remunerative work. See *F. W. Woolworth Co.*, 90 NLRB 289, 292.

The dischargee in Case III now recovers the full $300 which he would have earned in the time which he lost from work as the result of the employer's unfair labor practice; since subsequent earnings are not deducted from back pay accrued for time lost in earlier quarters, the discriminatee is substantially (although, of course, not entirely) reimbursed in monetary terms for the time lost from work.

Another loss which can be restored by the Board, although it cannot feasibly be measured in terms of money, is the loss of Social Security credits suffered by a dischargee when his back pay is wiped out, under the pre-*Woolworth* formula, by subsequent earnings. As we have shown (pp. 13-14, *supra*), when gross back pay was altogether wiped out by interim earnings, as was sometimes the case, the Social Security credit for any quarter in which the employee was entirely unemployed was also wiped out. The worker's right to Social Security coverage can be effectively protected against the employer's illegal discrimination only by dividing the back-pay computation into periods as small as quarters, thereby insuring coverage for every quarter to which the workers are entitled to coverage. It was partly in an effort to reinstate full Social Security coverage, in order better to effectuate the policies of the Act, that the Board devised

the *Woolworth* formula. See *F. W. Woolworth Co.*, 90 NLRB 289, 293.

B. IN SELECTING THE *WOOLWORTH* FORMULA TO RESTORE AS EFFECTIVELY AND AS EARLY AS POSSIBLE THE SITUATION WHICH WOULD HAVE EXISTED BUT FOR THE DISCRIMINATION, THE BOARD HAS NOT EXCEEDED ANY LIMITATIONS UPON ITS POWER TO EFFECTUATE THE POLICIES OF THE ACT

In respondent's brief and in the opinion below, there appear suggestions that the Board may have exceeded various limitations upon its power to effectuate the policies of the Act. These suggestions derive from an erroneous conception of the Board's duties in administering the Act, and of the Board's reasons for devising the *Woolworth* formula.

1. In setting aside the Board's selection of the *Woolworth* formula, the court below observed: "The employee is entitled to be made whole, but no more" (R. 76). Apparently implicit in this observation is a theory that (1) the *Woolworth* formula makes the employee "more than whole," and (2) the Board's remedial power is exhausted when the employee's monetary losses have been restored, so that the Board must disregard the probable effect upon the concomitant remedy of reinstatement of one rather than another formula for computing losses.

The first step of this theory seems to rest on the assumption that the sole appropriate basis for measuring the loss sustained by the dischargee is the over-all period from the date discrimination begins to the date discrimination ends. The fallacy

of this assumption has already been made clear, at pp. 27 to 29, *supra*. Eligibility for Social Security benefits, for example, is lost in terms of calendar quarters, not in terms of periods of discrimination; this eligibility can be restored only if back pay is computed in terms of units as small as quarters. With respect to money, what the discriminatee loses as the result of his illegal discharge are the wages for the precise periods of time, *i.e.*, hours, weeks, months, during which he has been unemployed or employed at lower wage rates—not the money he would have earned in the discharging employer's service during the entire period of discrimination. Actually, this loss can be measured accurately only in terms of precise periods of unemployment or employment at a lesser wage rate—not in terms of the total period of discrimination. If the Act could be construed to restrict the Board to any one method of computing back pay, therefore, it would be a formula based upon those periods, as is the second formula described at page 14, *supra*. Under such a method of periodic calculation, the employer would fare far worse than under the *Woolworth* formula. However, the Board is not restricted to the use of such impractical formulae any more than to the use of unfair ones, such as the pre-*Woolworth* formula; hence, the Board has devised a workable quarterly formula which substantially restores to the dischargee the wages he would have earned during the periods he was unemployed or employed at a lower wage rate.

Far more serious, however, than this failure to

comprehend the economic plight of the discriminatee is the illusion that the Board's remedial power is exhausted when the dischargee's monetary losses have been restored. The view of the court below is illustrated by the observation that under the *Woolworth* formula "it would frequently result that the suspended employee would receive more in back pay * * * than he would have earned in uninterrupted employment" (R. 75). By the same token, under the pre-*Woolworth* formula it frequently resulted that the employer who discriminated would pay *less* in back pay than he would have paid the discriminatee in uninterrupted employment. Indeed, this is still true of the *Woolworth* formula. Does it follow that neither formula is valid? Does it follow that no formula can ever be valid?

The fallacy of this word play lies in its premise that the financial status of the employee or of the employer is an end in itself. On the contrary, the Board is concerned with altering the financial status of either party only to the extent that such alteration is a means to the ultimate end of effectuating the policies of the Act, by restoring the situation which would have existed but for the discrimination. This Court has emphasized time and again that "[t]he Board [does not exist] for the adjudication of private rights; [it] acts in a public capacity to give effect to the declared policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." *National Licorice Co.* v. *National Labor*

Relations Board, 309 U.S. 350, 362; *Nathanson, Trustee* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952. And see *Amalgamated Utility Workers* v. *Edison Co.*, 309 U.S. 261, "[T]o limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 193. The back-pay order is a "remed[y] created by statute . . . designed to aid in achieving the elimination of industrial conflict. [It] vindicates public, not private rights." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 543.

These public rights are best vindicated by "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. Restoration of the financial status of the employee is, of course, one aspect of that situation, but only one. We have explained above that the *Woolworth* formula is designed to protect as well his right to reinstatement in the job from which he was illegally discharged, when the Board prescribes that remedy, and to avoid rewarding the employer who frustrates effectuation of that remedy by delaying reinstatement. In fashioning the remedy of back pay to achieve these objectives the Board's discretion is not to be fettered by conventional common

law or chancery principles relating to the duty to "make whole" those who suffer private grievances. *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U.S. 533, 543. See also, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 48-49. "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 198. The Act authorizes the Board to award "back pay" in order to restore the status quo, not to "make whole" the employee in order to redress his private grievances. Whatever might be the common law formulae for computing damages for breach of an employment contract, those formulae are not incorporated into the statutory phrase "back pay." That phrase introduces a new, statutory concept of an award to be computed by whatever method the Board finds will most satisfactorily effectuate the policies of the Act.

2. Respondent further suggests that a back-pay order computed under the *Woolworth* formula is of a "penal" rather than a "remedial" character, and is therefore beyond the scope of the Board's authority, citing *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U.S. 7, 11-12. Why this is so does not appear. Surely the *Woolworth* formula cannot result in any substantial hardship

to the employer. His back-pay liability is, under all circumstances, limited by the amount which he would have paid the employee but for his own illegal discrimination.[8] Moreover, in this regard the *Woolworth* formula adds no special liability for any employer; it merely removes a discrimination in favor of the employers who perpetuate their violations for the longest time. To illustrate this point, we refer again to the hypothesis of Case III, p. 19, *supra,* in which case the dischargee has no interim earnings in the first quarter, but in the second quarter has interim earnings in excess of his previous wage. Suppose Employer A offers reinstatement at the end of the first quarter: his back-pay liability is $300. Suppose Employer B delays reinstatement through the second quarter. Under the pre-*Woolworth* formula, his back-pay liability would have been only $200. If the $300 liability for Employer A is "remedial" and valid (*National Labor Relations Board* v. *Jones & Laughlin Steel*

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[8] Experience with the *Woolworth* formula since its adoption over 2 years ago discloses its essential fairness in operation by the reaction of employers to it. Through March 31, 1952, $1,033,000 in back pay, computed in accordance with *Woolworth*, was paid to 26,646 workers. During the same period, some 55 back-pay orders incorporating this formula came before the courts of appeals. Except for the present case, and one other case in which the employer was represented by the same counsel and which was withdrawn from enforcement for other reasons, *National Labor Relations Board* v. *Pacific Mills*, C.A. 4, No. 6257, 91 NLRB 60, prior to the decision below no objection had been raised to the revised method of computation. The absence of substantial protest convincingly demonstrates that employers do not feel they are being required to pay employees more than their due.

Corp., 301 U.S. 1, 48-49), it is not easy to understand why a formula imposing no more than the same liability on Employer B is "penal" and invalid.

To lend this argument some color respondent relies upon the Board's explanation of one of its reasons for selecting the *Woolworth* formula—to eliminate the reward which accrues to the employer who perpetuates his discrimination for the longest time. It is true that the Board may not add to the employer's liabilities simply to discourage future violations. *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 12. In selecting the *Woolworth* formula, however, the Board did not impose upon the employer an additional liability; the Board merely prescribed an alternative formula for computing the back pay which is concededly due, in order more effectively to "achieve the remedial objectives which the Act sets forth." *Ibid.* In devising a method for computing back pay, the Board would be derelict in its duty if it gave no weight to the desirability of effectuating this purpose as soon as possible, by withholding the premium which the former method placed upon the employer's persistence in illegal discrimination.

3. Finally, the court below apparently thought that the deficiencies of the pre-*Woolworth* formula could be better remedied on an *ad hoc* basis (see R. 76). The suggestion apparently contemplates that evidence be taken in each unfair labor practice hearing to show whether the discriminatee has

waived his right to reinstatement in order to preserve his accumulated back pay, or whether the employer has delayed reinstatement for the purpose of reducing his back pay liability, and that an affirmative finding on either of these points would support some further remedial order by the Board. There are several answers. First, it is contrary to the Board's settled practice, as approved by this Court, to take evidence concerning back pay at the unfair labor practice hearing. "At the time an order of the Board is enforced the amount of back pay is often not computed. [9] Once an enforcement order issues the Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed. This may be done by negotiation; or it may have to be done in a proceeding before the Board. The computation of the amount due may not be a simple matter." *Nathanson* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, p. 4. To inject the difficulties of back pay computation into the unfair labor practice hearing would add a complication which is at best unnecessary, for that evidence could be heard as well at the back pay hearing. Further, it is often entirely wasted, for an overwhelming majority of cases are settled without a hearing on back pay, after the Board's order is enforced.

Second, assuming, *arguendo*, that courts would deem it preferable to take the evidence at an unfair

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[9] As a matter of fact, the amount of back pay is rarely, if ever, computed before the Board's order is enforced.

labor practice hearing, this is not sufficient to warrant displacement of the Board's choice. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. See also, *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 539-540.

Third, as we have shown above (p. 13), the court below was misguided in its assumption that the pre-*Woolworth* formula adequately compensated the discriminatee for time lost from work.

Fourth, the suggestion was apparently offered without appreciation of the difficulties of *ad hoc* adjudication of these issues. Aside from the difficulty of proving the motives underlying a waiver or delay in offering reinstatement, the salient point is that there is often no opportunity to prove them in the manner envisioned by the court below. The court requires that a pre-*Woolworth* type of order be used unless "a hardship case" is made out at the unfair labor practice hearing (R. 76). Frequently, however, it is not until after that hearing, or even after a decree of enforcement, that the dischargee will obtain a better paying job, presenting the problems which concern the Board. Thus, the "hardship case" often does not even come into existence until after the court enters a decree en-

forcing the pre-*Woolworth* back-pay order—and then, of course, the decree cannot be amended. *International Union of Mine, Mill and Smelter Workers, Local No. 15* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335. The decree of the court below, enforcing a pre-*Woolworth* order, flatly precludes the Board from "decid[ing] on its own facts" any "hardship case" where the "hardship" arises after entry of the Board's order.

If this point had been clear to the court below, perhaps it would not have insisted on use of the pre-*Woolworth* formula, but would instead have remanded the proceedings to the Board so that the Board could, if it desired, "frame an order which by its terms required modification" (*Eagle-Picher* case, *supra*, at 341) in the event that a "hardship case" should appear at a subsequent hearing. The *ad hoc* adjudication suggested by the court below would thus require at least two hearings on the question of "hardship": one at the unfair labor practice hearing and another after the employer finally offers reinstatement. Such a process could also require an unlimited number of other hearings, for the employer may refuse to offer reinstatement on the ground that a new "waiver," not yet litigated in terms of "hardship," relieves him of the obligation to make such an offer. It is not easy to discern the merit in a system of *ad hoc* adjudication which requires at least two, and possibly many more, necessarily incomplete hearings on the same issue concerning different periods of time. The Board can hardly be charged with caprice in

exercising its unquestioned authority to formulate a general rule to eliminate altogether the dischargee's need to waive reinstatement and the employer's advantage in delaying reinstatement. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793. In applying such a rule, the Board need not hold hearings in each case to prove in an adversary proceeding that the employer's unfair labor practice would inevitably give rise to these evils. The "requirement [of an adversary proceeding] does not go beyond the production of evidential facts [to prove the employer's violation of the Act], and compel evidence as to the results which may flow from such facts. *Market Street R. Co.* v. *Railroad Comm'n*, 324 U.S. 548, 559. An administrative agency with power after hearings to determine * * * whether violations of statutory commands have occurred may infer within the limits of the inqury from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. *Labor Board* v. *Virginia Power Co.*, 314 U.S. 469, 479; *Labor Board* v. *Hearst Publications*, 322 U.S. 111, 130." *Republic Aviation Corp.* v. *National Labor Relations Board*, *supra*, at 800.

Fifth, to confine the Board to the *ad hoc* processes apparently contemplated by the court below

would prevent the Board from affirmatively protecting the discriminatee against the need to waive reinstatement and from eliminating the reward which accrues to the employer who delays reinstatement. The court below apparently contemplates that when it is found that an employer has perpetuated his discrimination solely, or perhaps partly, for the purpose of reducing his back-pay liability, the Board might impose some further sanction. But what? Presumably in such a case the court would sustain something in the nature of a back-pay order based upon the *Woolworth* formula. If this sanction is appropriate, however, for an employer who delays reinstatement for economic motives, one cannot easily comprehend why the general application of the *Woolworth* formula is unduly severe for an employer who delays reinstatement because of an antiunion animus. The incongruity of this position emphasizes the fundamental misconception of the court below. The Board is not concerned with punishing employers because of the reasons for their discrimination; rather the Board is concerned with "avoiding the consequences of violation [of the Act] where those consequences are of a kind to thwart the purposes of the Act," *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 236. One of the consequences of the employer's discrimination under the pre-*Woolworth* formula, as we have shown above (pp. 11-12), was that when the dischargee obtained a better paying job the employer found it economically advantageous to per-

petuate his discrimination, thereby postponing the reinstatement which is required to effectuate the policies of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. This advantage cannot be removed by any *ad hoc* sanctions imposed after the fact, for the employer has much to gain and little (or, if the sanction is no more severe than the *Woolworth* formula, nothing) to lose by delaying reinstatement and gambling on the difficulty of proving at a subsequent hearing the motivation for his delay. The *Woolworth* formula, on the other hand, substantially eliminates the employer's incentive to delay reinstatement. To suggest that the Board might accomplish some lesser objective in another way, after holding additional hearings, is not to suggest that the Board's selection of the *Woolworth* formula was less than reasonable.

The court below apparently contemplates that when it is found that the dischargee has been compelled to waive his right to reinstatement in order to preserve his accrued back pay, some further order might be issued by the Board. But one can only guess what sort of *ad hoc* remedies the court below might suggest. The only possibility which can be inferred from the opinion is that in some (or perhaps all) cases the Board might hold the discriminatee's waiver of his right to reinstatement to be invalid for some or all purposes.

It might be suggested that the waiver of reinstatement be disregarded by the Board only for the purpose of ordering reinstatement, and be re-

garded as sufficient to toll the running of back pay. Whatever advantages such a rule may be expected to bring to the discriminatee, the expectation clearly rests on the presumption that dischargees generally are sufficiently learned and sophisticated to understand these subtle effects of of the waiver, and to take advantage of the rule by executing a half-meaningless waiver at precisely the right moment. One cannot seriously urge that the Board would be acting irrationally in rejecting this picture of the average dischargee, and in seeking a more effective method of protecting the rights of self-organization.[10] This suggested rule, moreover, fails to preserve for even the most sophisticated dischargee his freedom to choose between jobs. In order to preserve his right to reinstatement, he must renounce his half-waiver at or before the unfair labor practice hearing, for otherwise the Board will not order reinstatement. E.g., *E. A. Laboratories, Inc.*, 80 NLRB 625, 627, modified and enforced, 188 F. 2d 885 (C.A. 2), certiorari denied, 342 U.S. 871. At the time of the renunciation, the dischargee's back pay again starts running, and, before the *Woolworth* formula, his

[10] With respect to waivers made before the unfair labor practice hearing, the Board has in fact followed a related practice for many years. If the dischargee removes himself from the employer's labor market by waiving reinstatement prior to the unfair labor practice hearing, he may renounce the waiver at the hearing, but the running of back pay is tolled from the time of the waiver to the time of the renunciation. E.g., *English Freight Co.*, 67 NLRB 643, 643-644, enforced, 152 F. 2d 756 (C.A. 5). As shown in the text, however, this rule cannot protect the dischargee from the need to waive reinstatement after the unfair labor practice hearing.

earnings from the time of the renunciation to the time of the employer's actual compliance with the order of reinstatement would cancel out the back pay accrued for time previously lost from work because of the employer's illegal discrimination. This suggested rule therefore offers the discriminatee no real protection, for he is still compelled to waive his right to reinstatement at or after the hearing, in order to protect his accrued back pay.[11]

It may be that the court below assumed that the reason for waivers made after the unfair labor practice hearing might be the subject of further hearings. But then the Board would be overwhelmed with a flood of useless hearings. The only way to stop the flow of these hearings is to eliminate the need for such waivers, by computing back pay in a manner which prevents greater earnings in later periods from reducing back pay accrued for time lost in earlier periods. It is not surprising, therefore, that the Board felt obliged to study a number of methods for achieving this result, and ultimately to select the *Woolworth* formula, which substantially protects the dischargee from the need to waive his right to reinstatement.

In short, it is impossible to devise any system of

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[11] If it is to be suggested that the waiver be disregarded for all purposes, the suggestion is even less persuasive. Again, it is feasible to invalidate only waivers made before the unfair labor practice hearing, and the right to reinstatement is given no real protection. Such a rule would differ from the rule of the *English Freight* case, note 10, *supra*, only in that it would deprive the discriminatee of even more of the back pay accrued for time lost from work.

ad hoc adjudication which will as nearly effectuate the policies of the Act as does the *Woolworth* formula. If the gist of the decision below is that the Board acted capriciously in devising and applying that formula, we submit that it might more reasonably be said that the Board would have been derelict in its duties under the Act had it not endeavored to devise some such formula, in order to restore as effectively as possible the situation which would have existed but for the discrimination.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed insofar as it denies enforcement to a part of the Board's order, and that the Board's order is valid and proper, and should be enforced in full.

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DECEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), as further amended by Public Law 189, October 22, 1951 (82nd Cong., 1st Sess.), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabiliza-

tion of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions

of their employment or other mutual aid or protection.

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RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8 (a). It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be

affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

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